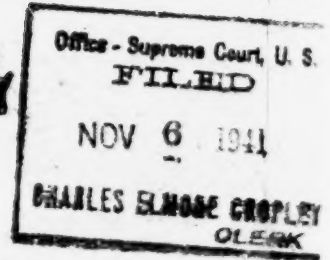


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No. 248

In the Supreme Court of the United States

OCTOBER TERM, 1941

**GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER**

v.

LERNER STORES CORPORATION (Md.)

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE PETITIONER

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(I)

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OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11) is not reported. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 28-30) is reported in 118 F. (2d) 455.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 12, 1941. (R. 31.) The petition for a writ of certiorari was filed July 8, 1941,

and was granted October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Taxpayer filed a timely capital stock tax return in which, because of a clerical error made by one of its employees, it declared a value for its capital stock lower than that which it had intended to declare. The question is whether, after the period for filing original returns had expired, the taxpayer was entitled to file an amended return changing the declaration to the value originally intended.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix to the Government's brief in *Scaife Co. v. Helvering*, No. 57, present Term.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 10) may be summarized as follows:

Taxpayer corporation was granted an extension of time to September 29, 1936, within which to file its capital stock tax return for the year ended June 30, 1936. It filed its return on September 27, 1936, declaring a value of \$25,000 for its capital stock. The figure of \$25,000 was entered on the return through a mistake made by one of tax-

payer's employees. In the computation, the tax due was reported to be \$25 and the interest was reported as 25¢, making a total of \$25.25. The return was signed and sworn to by J. H. Hersch and Graham Magee, both of whom were vice-presidents of the taxpayer.

In the course of going over the taxpayer's accounts prior to the end of its fiscal year (January 31, 1937), Hersch discovered the error in declaring the capital stock at \$25,000. Thereafter, on January 27, 1937, taxpayer forwarded an amended capital stock tax return on which it entered the figure of \$2,500,000 opposite the words "Declared Value of Entire Capital Stock." The amount of tax, penalty and interest computed by the taxpayer on the form was \$3,090, consisting of a tax of \$2,500, a penalty of \$500, and interest of \$90. By letter dated July 12, 1937, the Commissioner advised taxpayer that the alleged amended return could not be accepted, and refunded the money paid with it.

In computing the taxpayer's net income subject to excess profits tax for the fiscal year ended January 31, 1937, the Commissioner used the \$25,000 declared value appearing on the first capital stock tax return; on that basis he determined a deficiency of \$27,947.38 in excess profits tax (R. 11). The Board sustained the action of the Commissioner (R. 12) but the court below reversed (R. 30).

ARGUMENT

This case presents substantially the same question as that presented in *Scaife Company v. Helvering*, No. 57, present Term, with which the present case is to be argued. Accordingly, we refer the Court to our brief in the *Scaife* case for the reasons why we believe the decision in this case should be reversed.

The present case, it is true, presents equities more favorable to the taxpayer, because the error in declaring the value here was the result of a clerical mistake made by an employee of the taxpayer, while the error in the *Scaife* case lay in the inadvertent disregard by the taxpayer's treasurer of the vice-president's instructions. However, for the reasons set forth in our brief in the *Scaife* case, we believe that neither type of mistake justifies reading into the statute a right of amendment which Congress not only failed to provide but which it explicitly prohibited.

Respectfully submitted,

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OCTOBER, 1941

